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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CAROL S. VIGLIOTTI, Plaintiff and Appellant, v. SARAH HARKLEROAD, Defendant and Respondent.	D055638 (Super. Ct. No. GIC852371)

APPEAL from an order of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed as modified.

Carol Vigliotti sued Sarah Harkleroad for injuries following a vehicle collision in a parking lot. The jury returned a defense verdict, finding Vigliotti did not prove Harkleroad caused Vigliotti's claimed injuries. The trial court granted Vigliotti's new trial motion, but this court reversed that order. (*Vigliotti v. Harkleroad* (Oct. 30, 2008, D051168) [nonpub. opn.] (*Vigliotti*).) Vigliotti then moved to tax Harkleroad's claimed costs of $21,090.84. After a hearing, the court denied Vigliotti's motion and permitted

Harkleroad to recover all of her claimed costs. Vigliotti appeals from this order. We affirm, except that we strike $67.54 from the cost award.

FACTUAL SUMMARY[1]

In October 2003, Harkleroad was slowly backing out of a parking space when her vehicle collided with the side of Vigliotti's car. Vigliotti claimed she suffered substantial injury, including to her back, shoulder, and left hand. Harkleroad admitted liability, but disputed the nature and extent of Vigliotti's claimed damages. Vigliotti sued Harkleroad seeking compensation for medical expenses, lost income, and pain and suffering.

At trial, Vigliotti sought damages only with respect to injuries to her left hand. She testified that on the evening of the accident, she went to an urgent care facility complaining about pain in her neck, shoulder, left hand, and lower back. One week later, Vigliotti said her hand was still tender, and a doctor put her hand in a splint. Doctors later diagnosed an occult fracture in her left hand.

When she continued to have pain and a lack of strength in her left hand, in May 2004, Vigliotti consulted Dr. Delois Bean, an orthopedic hand specialist. In October 2004, Dr. Bean performed surgery on Vigliotti's hand. In March 2005, Dr. Bean recommended another surgery. Vigliotti testified that at the time her hand was so painful that she was unable to engage in daily activities.

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1 Our prior opinion details the facts about the accident and the trial. (*Vigliotti, supra*, D051168.) We discuss only the facts relevant to resolving the appellate issues before us.

Dr. Bean testified at trial as Vigliotti's treating physician and medical expert. Dr. Bean opined that Vigliotti sustained a fracture to her hand from the vehicle accident and this fracture was "superimposed" on "pre-existing degenerative arthritis." She said that the preexisting arthritis made Vigliotti more susceptible to an injury. Dr. Bean further opined that the two hand surgeries were related to the automobile accident.

Defense expert Dr. David Smith testified that he performed a medical examination on Vigliotti and reviewed her medical records. He opined that Vigliotti did not suffer a fracture to her hand as a result of the accident, and that instead her two surgeries resulted from the preexisting degenerative arthritis. But Dr. Smith acknowledged that Vigliotti did appear to have suffered a left hand *strain* as a result of the accident. This opinion was based on Vigliotti's subjective complaints to her treating doctors. Dr. Smith said the strain was superimposed upon Vigliotti's existing arthritis.

Dr. Peter Burkhard, a biomechanical engineer, was a defense expert who testified about accident reconstruction issues involving the mechanics of the crash. Dr. Burkhard stated that based on Vigliotti's description of the collision, it was likely the impact felt by Vigliotti occurred from Vigliotti's applying the brakes just before the accident rather than from a side impact.

On a special verdict form, the jury found Harkleroad's negligence was not a "substantial factor in causing harm to . . . Vigliotti." The court then granted Vigliotti's new trial motion, orally stating that each of the experts (including the defense expert) testified that Vigliotti did suffer some damage.

Harkleroad appealed, and this court reversed. (*Vigliotti*, *supra*, D051168.) We found the court erred in failing to provide a written statement of reasons for its decision. (*Ibid.*) We further determined the court erred in granting the motion because substantial evidence supported the jury verdict that Harkleroad *did not* cause Vigliotti's claimed injuries. (*Ibid*.) We explained: "Vigliotti testified she was only seeking damages for injuries to her left hand. Her doctor did not opine she suffered any soft tissue injuries as a result of the accident. Although Harkleroad's expert [Dr. Smith] testified concerning her subjective complaints of soreness in her neck and shoulder, the jury was free to reject that testimony. . . . Given the mechanics of the accident, the slow rate of speed, the minimal forces involved, and nominal vehicle damage, the jury could have concluded the injuries to her left hand were caused by a preexisting arthritic condition." (*Ibid*.)

Harkleroad thereafter requested costs as the prevailing party, supported by her previously filed memorandum of costs. In the memorandum, Harkleroad claimed total costs of $21,090.84, which consisted of: $680 in filing fees; $979.92 in jury fees; $2,722.27 in deposition costs; $13,197.85 in expert witness fees; $2,150.86 in models/photocopies of exhibits; $1,292 in court reporter fees; and $67.54 in "Other" costs (later identified as Federal Express charges).

Vigliotti objected to each category of costs. Harkleroad responded that the costs were proper under Code of Civil Procedure section 1033.5 and/or under Code of Civil

Procedure section 998 based on Vigliotti's rejection of Harkleroad's $3,501 settlement offer.[2]

After a hearing, the court denied Vigliotti's motion and allowed Harkleroad to recover all of her claimed costs. On appeal, Vigliotti reasserts her challenges to some of the cost items. For the reasons explained below, we find these challenges are without merit, except for the Federal Express costs.

DISCUSSION

I. *Generally Applicable Appellate Rules*

In considering an appeal, we begin with the presumption that a trial court's judgment or order is presumed correct and reversible error must be affirmatively shown by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) The appellant must "present argument and authority on each point made" (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591), and must cite to supporting evidence in the record (rule 8.204(a)(1)(C); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115). An appellant's "[f]ailure to provide an adequate record on an issue requires that the issue be resolved against [the appellant]." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

Moreover, a party who challenges the factual basis of a court's conclusion must set forth, discuss, and analyze *all* the evidence on that point, *both favorable and unfavorable*. (See *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 737-738 (*Schmidlin*).)

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2 All further statutory references are to the Code of Civil Procedure. All rule references are to the California Rules of Court.

If the appellant fails to cite and discuss all of the relevant evidence, we may treat the issue as waived. (*Ibid.*)

II. *Harkleroad's Motion to Strike*

Appellate arguments must be based on a proper appellate record. One component of an appellate record is an appellate appendix, which contains designated documents filed in the court below, as specified in rule 8.124(b). Harkleroad moved to strike documents in Vigliotti's appellant's appendix contained at pages 1 through 31 and pages 67 through 80, arguing that the inclusion of these documents violate rule 8.124. We agree these documents are not properly part of the appellate record.

First, the documents contained at pages 1 through 31 of the appellate appendix do not appear to have been part of the superior court proceedings and therefore are outside the record of this appeal. (See rule 8.124(g); *The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404.) Vigliotti says that some of these documents were lodged with certain motions filed in the pretrial proceedings. But she does not cite to anything in the appellate record supporting this claim.

Second, the documents contained on pages 67 through 80 of the appellate appendix reflect a portion of a reporter's transcript of the trial testimony of Dr. Smith. The rules prohibit an appellant from including a reporter's transcript in an appellate appendix that may be designated under rule 8.130. (See rule 8.124(b)(3)(B).) This rule prevents a party from avoiding the requirements and safeguards imposed by rule 8.130 applicable to designating and preparing a reporter's transcript.

III. *Section 998*

Vigliotti challenges the court's denial of her motion to tax costs for items claimed under section 998, subdivision (c), including Harkleroad's expert fee costs of $13,197.85.

Under section 998, "any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." (§ 998, subd. (b).) If a defendant's section 998 offer "is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer." (§ 998, subd. (c).) In addition, the court "may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses . . . actually incurred and reasonably necessary in . . . preparation for trial . . . of the case by the defendant." (*Ibid*.)

A. *Good Faith Offer*

Harkleroad made a section 998 settlement offer of $3,501 and Vigliotti failed to recover more than the offer. Vigliotti nonetheless contends the court erred in permitting Harkleroad to recover her section 998 costs because the settlement offer was not made in good faith.

1. *Legal Principles*

An exception to the rule permitting recovery of costs under section 998, subdivision (c) applies if the plaintiff affirmatively establishes that the defendant's offer was not made in good faith and had no reasonable probability of being accepted by the plaintiff. (*Arno v. Helinet Corp*. (2005) 130 Cal.App.4th 1019, 1024-1025.) "[T]o

qualify as a good faith offer, [the offer] must be 'realistically reasonable under the circumstances of the particular case' and must carry with it some reasonable prospect of acceptance. [Citation.] 'One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees.' [Citation.]" (*Ibid*.)

"[W]hen a party obtains a judgment more favorable than its pretrial offer, it is presumed to have been reasonable and the opposing party bears the burden of showing otherwise." (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 338-339.) "If the offer is in a range of reasonably possible results and the offeree has reason to know the offer is reasonable, then the offeree must accept the offer or be liable for costs under . . . section 998." (*Id.* at p. 339.) "'Even a modest or "token" offer may be reasonable if an action is completely lacking in merit.'" (*Ibid*.) The trial court must base its reasonableness determination on information that was known or reasonably should have been known to both the defendant and the plaintiff when the offer was made. (*Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1528; *Elrod v. Oregon Cummins Diesel, Inc*. (1987) 195 Cal.App.3d 692, 699 (*Elrod*).)

"Whether a section 998 offer was reasonable and made in good faith is left to the sound discretion of the trial court." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.) "An appellate court reviewing a section 998 offer may not substitute its opinion for that of the trial court unless there has been a clear abuse of discretion, resulting in a miscarriage of justice." (*Arno v. Helinet Corp*., *supra*, 130 Cal.App.4th at p. 1025.) The appellant has the burden to establish an abuse of discretion, and unless a clear case of

abuse is shown, a reviewing court will not divest the trial court of its discretionary authority. (*Nelson, supra*, 72 Cal.App.4th at p. 136.)

2. *Factual Background*

Six months after Vigliotti filed the complaint, on February 17, 2006 Harkleroad made a $3,501 settlement offer, with the parties to bear their own costs. After this court reversed the new trial order, Harkleroad sought to recover her expert witness fees and postoffer costs under section 998, subdivision (c), based on Vigliotti's failure to recover more than the $3,501 offer.

Vigliotti opposed the motion on the basis that the section 998 offer was a "'token offer'" that was "made in 'bad faith.'" Vigliotti asserted (without presenting supporting evidence) that the offer was made after she had incurred $944.39 in costs and after she received notice of her insurer's medical payments subrogation demand of $1,663.47. Vigliotti thus argued that if she had accepted the offer, after paying her own attorney fees she would have still owed $273.86. She further argued that the offer was unreasonable because Harkleroad admitted liability; both plaintiff and defense experts "linked plaintiff's injuries to the accident"; and a damage award could have "easily exceeded" $100,000.

After a lengthy hearing, the court concluded Vigliotti did not meet her burden to show the offer was unreasonable. The court stressed that in evaluating a settlement offer, a plaintiff must realistically assess how his or her case would appear to a jury and the reasonable likelihood in prevailing at a jury trial. In this regard, the court stated: "[I]t's very important that we are talking about a parking lot bump. And it's hard for an

individual [juror] to understand that a parking lot bump would cause $60,000 in medicals and [the] pain and suffering [damages requested by the plaintiff]."

3. *Analysis*

In challenging the court's factual conclusion that she did not meet her burden to show the settlement offer was unreasonable, Vigliotti essentially reasserts the same arguments she made to the trial court in the proceedings below. In so doing, Vigliotti ignores the governing standard of review. The issue before us is not whether this court believes Harkleroad's section 998 offer was reasonable or unreasonable. Instead, it is whether the record establishes the trial court, which presided over the trial and was most familiar with the facts of the case, clearly abused its discretion in reaching *its* determination on the issue.

We determine the trial court did not abuse its discretion. When Harkleroad made the offer, she was aware the accident was a low-speed parking lot collision, yet Vigliotti was claiming that she had a severe hand injury and had incurred about $60,000 in medical bills. The defense also knew of Vigliotti's preexisting arthritis and thus that causation would be a highly disputed issue at trial. Knowing these facts, Harkleroad offered $3,501 and a waiver of costs to avoid a trial. Although the offer was admittedly low relative to Vigliotti's claimed damages, Harkleroad could have reasonably evaluated the case to conclude it was unlikely the jury would find Vigliotti's claims to be credible. Under these circumstances, the court did not abuse its discretion in concluding the offer was reasonable and made in good faith.

In arguing the offer was unreasonable, Vigliotti asserts numerous arguments without providing any relevant supporting citations to the factual record. Therefore, the arguments are waived. (See *Guthrey v. State of California*, *supra*, 63 Cal.App.4th at p. 1115.) But even if we were to consider Vigliotti's arguments, they do not establish an abuse of discretion.

Vigliotti first contends it would have been unreasonable for her to accept the offer because even the defense expert (Dr. Smith) testified that the accident caused her some injury (a left hand strain). However, there are no facts before us showing that Dr. Smith had reached this conclusion and communicated the opinion to the parties before the section 998 offer was made. Dr. Smith's deposition occurred *after* Harkleroad made the section 998 offer. The trial court must base its good faith determination on information known when the offer was made. (*Elrod*, *supra*, 195 Cal.App.3d at p. 699.) Moreover, as discussed in our prior appellate decision, Dr. Smith's opinion was based on Vigliotti's subjective complaints, and the jury was free to reject Dr. Smith's opinion that Vigliotti may have suffered a hand strain from the accident.

Additionally, Harkleroad could have logically concluded that $3,501 was a reasonable estimate for the damages, given the relatively minor impact of the collision and Vigliotti's preexisting arthritis. Contrary to Vigliotti's assertions, the fact that she presented evidence that her "medical specials" were in excess of $35,000 does not mean the jury was bound to accept that these medical costs resulted from the accident.

Vigliotti additionally contends the "most compelling evidence" showing Harkleroad's offer was unreasonable is that "[Harkleroad's] own insurance company State

Farm paid [Vigliotti] for the medical expenses she incurred under her own medical payments coverage." The argument fails for several reasons.

First, there is no evidence in the record supporting Vigliotti's assertion that she received this medical payments benefit. Vigliotti relies solely on documents that have been stricken from the record. Second, Vigliotti did not make this argument in the court below, and thus waived her right to assert it here. Third, even assuming the medical-payments argument was properly raised and is supported by evidence in the appellate record, it does not advance Vigliotti's position. According to Vigliotti, Vigliotti and Harkleroad were insured by the same automobile insurer (State Farm) and State Farm agreed to pay Vigliotti's medical expenses under her first party coverage. However, the fact that Vigliotti's own automobile insurer may have paid her first party medical payments claim is not necessarily related to the evaluation of a liability claim in the third party context. The factors an insurer takes into consideration in deciding to pay a first party claim are not necessarily the same factors considered in evaluating a third party claim.

We additionally reject Vigliotti's argument that the $3,501 offer was unreasonable because Harkleroad accepted "100% liability for the accident . . . ." Harkleroad's concession does not negate the reasonableness of the offer because the main issue in this case was not negligence, but causation and damages.

Finally, we find unhelpful Vigliotti's reliance on several statements made by the trial court at the hearing on the costs motion. For example, she directs us to the court's observation that Vigliotti's doctor believed the amount of her medical bills was

reasonable and that the evidence appeared to show that the accident did "cause some injury" to Vigliotti.

The court made the comments while asking numerous questions of both counsel designed to test the validity of their respective positions. Viewed in context, the court's comments and questions demonstrate that the court took into consideration all of the relevant factors, fully understood the applicable legal standard and scope of its discretion, and had a clear recall of the witnesses and arguments asserted at trial. After considering counsels' arguments and assessing the record, the court found that when the section 998 offer was made, there was a considerable risk Vigliotti would not prevail at trial and/or that her recoverable damages would be minimal, and thus the offer was reasonable, particularly because it included a waiver of costs. Under the totality of the circumstances, the court acted within its discretion in reaching this conclusion.

B. *Reasonableness of Fees*

Vigliotti alternatively contends the court erred in rejecting her arguments challenging the reasonableness of the expert witness fees paid to Dr. Smith and Dr. Burkhard.

Under section 998, subdivision (c), a court may award the defendant a reasonable amount for expert witness fees that were "actually incurred and reasonably necessary" for trial preparation and trial of the case.

With respect to Dr. Smith, Vigliotti contends the amount claimed for his trial testimony ($4,081.60) was unreasonable because this amount was inconsistent with his

trial testimony on this issue. However, Vigliotti does not support her argument with admissible evidence in the record. Thus, the argument is waived.

In any event, we have reviewed the cited portions of Dr. Smith's testimony and have confirmed the testimony was not inconsistent with the claimed fees. Vigliotti complains that Harkleroad's costs memorandum reflects that Harkleroad paid Dr. Smith for testifying for a one-half day ($3,500) plus travel expenses, whereas Dr. Smith's trial testimony lasted only two hours and Dr. Smith testified he charges $500 per hour. However, there is nothing in the trial record showing that Dr. Smith's fee for his trial testimony is solely an hourly charge and that he does not impose a minimum fee for trial testimony. Harkleroad's evidence supported the court's determination that the $4,081.60 (one-half day charge plus travel expenses) was reasonable for Dr. Smith's trial testimony.

With respect to expert Dr. Burkhard, Vigliotti contends the amount awarded ($6,000) was unreasonable because the trial court permitted Dr. Burkhard to testify only as an accident reconstruction expert and granted Vigliotti's in limine motion to preclude his testimony on biomechanical matters. Vigliotti says the court abused its discretion because it should have awarded costs for Dr. Burkhard's fees only to the extent they were directly related to accident reconstruction.

However, the amount that may be recovered for an expert witness fee is not limited to the expert's trial testimony and "the determination of allowable costs is largely within the trial court's discretion." (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 124.) Dr. Burkhard testified that he has a Ph.D. in biomechanical engineering, and the court could have properly found his pretrial

preparation work on bioengineering matters was a reasonable expense for trial preparation in this case. In her reply brief, Vigliotti asserts that the court refused to permit Dr. Burkhard to testify as a biomechanical engineer because this testimony was "unreliable." However, she provides no supporting record citation, and we therefore disregard the argument.

Vigliotti additionally challenges Harkleroad's claim that Dr. Burkhard spent 16 hours on the case and charged $375 per hour. She states that this claim is inconsistent with Dr. Burkhard's trial testimony. She cites to Dr. Burkhard's cross-examination testimony during which he agreed with Vigliotti's counsel that he had worked a "*minimum* of six hours" on the case; he generally bills $375 per hour; and his charge for his trial testimony "is $1,500.00 *minimumly* . . . ." (Italics added.) Dr. Burkhard also testified that he was not certain of the total amount he had billed, but "we could certainly itemize all the hours I've expended and come up with a number if you'd like."

This testimony does not establish the claimed expert fees for Dr. Burkhard's services were inaccurate or unreasonable. Harkleroad's attorney signed the memorandum of costs, verifying that the claimed costs were accurate and the costs were necessarily incurred in the case. The trial court was entitled to rely on this verification. Dr. Burkhard did not say anything at trial suggesting a precise amount of time he had worked on the case. Rather, counsel's questions to him emphasized that she was seeking information on the *minimum* amount of time that he had worked on the case.

Vigliotti also objects to the claimed expert fees for Dr. Burkhard's work performed before the section 998 offer was made. However, under section 998, the court has the

discretion to award all expert witness fees, including those incurred before the offer was made. (§ 998, subd. (c)(1).)

IV. *Costs Awarded Under Section 1033.5*

Vigliotti additionally contends the court erred in denying her motion to tax costs claimed under section 1033.5.

A. *Legal Principles*

Unless "expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).) "This means that the prevailing party is entitled to all of his [or her] costs unless another statute provides otherwise . . . . Absent such statutory authority, the court has no discretion to deny costs to the prevailing party." (*Nelson v. Anderson*, *supra*, 72 Cal.App.4th at p. 129.)

Section 1033.5 sets forth the items that are allowable costs under section 1032. Generally, if "the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary." (*Ladas v. California State Auto. Assn*. (1993) 19 Cal.App.4th 761, 774.) If the challenging party presents a valid basis for an objection, the burden of proof then shifts to the prevailing party to show the cost was recoverable. (*Ibid*.) A trial court has broad discretion in determining whether the parties have met these burdens. (*Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1395.) A trial court's ruling will be reversed only if the appellant establishes a "'clear abuse of discretion' and a 'miscarriage of justice.'" (*Ibid*.)

We review each of the challenged costs under these principles.

B. *$80 Motion Fees*

Harkleroad sought $80 for filing two motions to continue the trial. Vigliotti contends these motions were unnecessary to the litigation because they were incurred solely to accommodate Harkleroad. However, Vigliotti fails to cite or discuss any of the evidence presented by Harkleroad on this issue. Thus, she has waived this contention. (See *Schmidlin, supra,* 157 Cal.App.4th at pp. 737-738.)

In any event, the contention fails on its merits. Harkleroad presented evidence showing the first motion was necessary because Vigliotti's expert was not initially available for her scheduled deposition, and the second motion was necessary because of scheduling issues to accommodate the schedules of Harkleroad's expert *and* Vigliotti's counsel. On this record, the court had a reasonable basis to conclude both motions were reasonable and necessary.

C. *Copies of Deposition Transcripts*

Harkleroad sought costs for copying the deposition transcripts of Harkleroad ($220.19), Dr. Burkhard ($362.63), and Dr. Smith ($251.55). Vigliotti contends the court abused its discretion in failing to tax these costs because Harkleroad had already received the original of the deposition transcripts.

Section 1033.5, subdivision (a)(3) provides that allowable costs include "transcribing necessary depositions including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed . . . ." Under this code section, a party is entitled to recover costs for making a copy of a deposition transcript. In this case, the court had a reasonable basis to find that

although Harkleroad maintained the originals of the deposition transcripts, her counsel acted appropriately in making one copy of the transcripts for use in preparing for trial. The court did not abuse its discretion in determining these costs were allowable under section 1033.5, subdivision (a)(3).

D. *Expert Deposition Fees Paid to Dr. Bean*

Vigliotti contends the court erred in allowing Harkleroad to recover the $900 payment Harkleroad made to Dr. Bean for her deposition. Dr. Bean was Vigliotti's treating physician and designated expert. Dr. Bean was deposed for two hours and she charged Harkleroad $450 per hour. Harkleroad paid the $900 to Dr. Bean under section 2034.430, subdivision (b) which generally requires a deposing party to pay a treating physician's reasonable customary or daily fee if she is a designated expert.

Vigliotti argues the fee is not recoverable *under section 1033.5, subdivision (b)(1)*, which provides that fees of experts not ordered by the court are not allowable as costs, unless "expressly authorized by law." (See *Baker-Hoey v. Lockheed Martin Corp*. (2003) 111 Cal.App.4th 592, 598-602.)

Harkleroad counters that Dr. Bean's fee was "expressly authorized by law" under section 998, subdivision (c) as a postoffer cost because the deposition occurred after the section 998 offer was made. (See *Brake v. Beech Aircraft Corp*. (1986) 184 Cal.App.3d 930, 940.) Under section 998, subdivision (c), if "an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff *. . . shall pay the defendant's costs from the time of the offer*." (Italics added.)

Vigliotti contends we cannot affirm on the basis of section 998, subdivision (c) because Harkleroad did not specifically raise this statute as a ground for the $900 payment below. However, in response to Vigliotti's motion to tax costs, Harkleroad's counsel submitted a declaration referring to Dr. Bean's deposition charge as having been incurred after the section 998 offer. Other evidence in the record additionally confirms that Dr. Bean's deposition occurred after the section 998 offer was made.

Based on these facts, the court had sufficient information to award the $900 amount under section 998, subdivision (c). A postoffer cost is awarded as a matter of law (and is not discretionary) if section 998 applies. (§ 998, subd. (c).) Thus, the fact that Harkleroad did not specifically mention in her cost memorandum that she was seeking the $900 under section 998 does not bar her recovery.

E. *Costs for Blowups and Photocopies*

Vigliotti contends the court erred in rejecting her challenge to Harkleroad's claimed costs of $2,044.06 for blowups and photocopies of exhibits used at trial.

Section 1033.5, subdivision (a)(12) states that costs for "blowups . . . and photocopies of exhibits" are allowable "if they were reasonably helpful to aid the trier of fact." In her costs memorandum, Harkleroad declared that the costs for the blowups and copies were actually incurred, and, in her supporting papers, she stated that the case involved complex causation issues and required four copies of four exhibit binders.

Vigliotti contends the court abused its discretion in awarding these costs because it appeared that not all of the blowups and photocopies were used at trial. In support, she cites to Harkleroad's counsel statement at the hearing on the motion to tax costs that she

could not recall how many of the exhibits were actually admitted into evidence. However, given that expenses for exhibits are expressly allowed by statute and appear proper on their face, the burden was on Vigliotti to show the expenses were unnecessary or unreasonable. (*Nelson v. Anderson*, *supra*, 72 Cal.App.4th at p. 131.) Thus, if Vigliotti believed that many exhibits were not helpful to the jurors because they were not admitted, she needed to present such evidence to the court. The trial judge, who presided over the trial, was in the best position to evaluate whether the exhibits were helpful to aid the jury, and to make a just and fair determination with respect to the exhibit photocopying charges. On the record before us, Vigliotti did not establish an abuse of discretion.

F. *Federal Express Costs of $67.54*

Vigliotti contends the court erred in rejecting her challenge to Harkleroad's claimed costs of $67.54 for Federal Express charges. We agree.

The costs statute expressly prohibits a party from recovering postage charges (§ 1033.5, subd. (b)(3)), which include amounts paid to mailing services such as Federal Express. (*Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1627.) If the statute expressly disallows a cost, a court has no discretion to award the cost, unless the cost is expressly permitted by another statute. There are no other statutes permitting recovery of Federal Express type costs.

In support of her claim for these expenses, Harkleroad relies on *Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 Cal.App.4th 11. However, to the extent *Foothill-De Anza* held a Federal Express charge to send a package is not equivalent to a

"postage" charge under section 1033.5, subdivision (b)(3), we find this authority to be unpersuasive. We also reject Harkleroad's claim that the Federal Express cost was a recoverable postoffer cost. Harkleroad did not assert this claim in the court below, and there was no evidence in the record from which the court could have reasonably inferred that this postage cost was incurred after the section 998 offer was made.

DISPOSITION

We strike $67.54 from the cost award. The order is affirmed as modified. The parties to bear their own appellate costs.

HALLER, Acting P. J.

WE CONCUR:

MCDONALD, J.

O'ROURKE, J.